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## **On Cherry-Picking ... or Trying to Have One's Cake and Eating It: past principles and practice in the pursuit of an alternative to [full] EU membership**

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**On Cherry-Picking ... or Trying to Have One's Cake and Eating It: past principles and practice in the pursuit of an alternative to [full] EU membership**

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DRAFT PAPER

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COMMENTS WELCOME

With the United Kingdom's continued membership of the EU being increasingly questioned and the Prime Minister, David Cameron, committed to 're-negotiate' the terms of membership, consideration is being given to what forms alternatives to [full] membership may take. While much current discussion focuses on the advantages and disadvantages of particular existing arrangements (e.g. European Economic Area, Swiss bilateralism), this paper examines the broader principles and practices that have to date underpinned – and undermined – EU's attempts to develop alternatives to [full] EU membership. Drawing on an analysis of the evolution of association as an alternative to membership, the paper assesses the principled, practical and political limitations the EU faces – and imposes on itself – in offering an acceptable balance of rights and obligations to states not wishing to assume the mantle of full membership. In its assessment the paper considers various proposed models of affiliate and associate membership. It also situates consideration of the UK case in the broader context of the EU's relations with other European non-member states for which membership may not be achievable and for which alternatives to membership (e.g. a form of privileged partnership) have been proposed. In doing so, the paper reflects on the precedent-setting consequences of any arrangement that the EU might reach with any state re-negotiating membership or withdrawing.

Domestic questioning of the merits of the United Kingdom's continued membership of the European Union (EU) has long been a feature of UK politics, manifesting itself in the 'no' campaign in the 1975 referendum, the Labour Party's policy of withdrawal in the 1983, backbench rebellions during the Prime Ministership of John Major, and the rise of extra-parliamentary parties such as the Referendum Party in the 1990s and more recently the United Kingdom Independence Party (UKIP). Rarely has the questioning been as intense as it is today, 40 years after the United Kingdom acceded to the European Communities in 1973. Various shades of euroscepticism dominate a domestic political debate that is currently focused on a Conservative Prime Minister's commitment to re-negotiate the terms of UK membership and hold an in-out referendum during 2017 assuming the Conservative Party return to government following the next general election in 2015. With withdrawal from the EU advocated by Conservative Party members of the government and an unprecedentedly large and vociferous number of Conservative Party backbench MPs the debate is as much about the whether to leave the EU and what sort of options exist for life outside the EU as it is about what the foci should be of Cameron's desired 'new settlement' to be negotiated after 2015. In the midst of the views being offered around these questions, the clamour for an 'EU referendum' has become so pervasive that a popular vote – whether on a continued membership, withdrawal or a new settlement – appears to be a political certainty. Such is the perceived popular support for a referendum – bolstered by opinion polls indicating increased dissatisfaction with EU membership – no political party can afford to be seen to oppose a referendum even if policy as yet is no explicitly in favours of putting continued membership to the vote.

While there can be no certainty that a future UK government will either seek to negotiate or achieve a new settlement or that a referendum will produce a vote either for the new arrangement or to leave the EU, the current tenor of the UK debate demands serious reflection on what alternatives to the *status quo* either exist or might be developed. The history of the EU relations with European non-members states has witnessed the establishment of various forms of association with differing levels of cooperation and integration. At a basic level, there have been the associations based on industrial free trade established through the Europe Agreements with the countries of Central and Eastern Europe (now all EU members) and the Stabilization and Association Agreements with the countries of the Western Balkans. Similar associations based on 'deep and comprehensive free trade areas' are due to be established with the eastern European neighbours (in particular Ukraine, Moldova and Georgia) as part of the Eastern Partnership. A more advanced form of association is that based on a customs union that has been established between the EU and Turkey. The most advanced form of association to date is the European Economic Area based on a dynamic and homogenous extension of the Single Market's free movement of goods, services, capital and workers to three of the four members of the European Free Trade Association (EFTA): Iceland, Liechtenstein and Norway. The intensity of this particular form of association – which in part is less intense than Turkey's association in that it does not involve a customs union and therefore the adoption of the EU's common external tariff and alignment with the EU's common commercial policy – is also reflected in the membership of the three EFTA-EEA states of Schengen. A similar level of integration has also been established with Switzerland, albeit on less dynamic basis, through a range of bilateral agreements.

Among advocates of UK withdrawal, the EEA and the Switzerland's bilateral relationship are often presented as preferred alternatives to membership. The Bruges Group has advocated following the Norwegian example and the EFTA-EEA option (van Randwyck, 2011). UKIP is less enthusiastic about the EEA, seeing it more as a temporary staging post from which to negotiate a more advantageous bilateral deal. It tends to be more sympathetic to a tailored arrangement following the Swiss

example (UKIP, 2011). For hard-line Conservative Party eurosceptics, both the EEA and have their attractions. For Cameron, who insists on his personal preference from remaining in the EU, neither is desirable. In announcing his commitment to a 'new settlement' and a referendum, he implicitly rejected both the Norwegian and Swiss options (Cameron, 2013). The influential eurosceptic think tank, *Open Europe*, adopts a similar position arguing that, from a trade perspective at least, neither option – nor the option of a customs-union based association similar to Turkey's – constitutes an off-the-peg model that the UK could adopt (Open Europe, 2012). The preference, shared by Cameron, is for a new form of membership.

Although none of the existing forms of association is the preferred option of either the Conservative Party, its coalition partner, the Liberal Democrats, or the opposition Labour Party – or indeed any of the other political parties with MPs – analysis of the options for any 'new settlement' for UK membership of the EU should not lose sight of the existing relationships that the EU has created with European non-member states. This is for three reasons. First, a UK referendum on continued membership could lead to withdrawal in which case an alternative relationship would have to be found. Existing associations would provide options and models. Second, the nature and content of existing associations provide valuable insights into the principles and practices that underpin the forms of integration which the EU is willing to establish. This is important since there is an implicit and misplaced assumption in much of the rhetoric surrounding the desired 'new settlement' – as well as on the nature of any post-withdrawal settlement negotiated under Article 50 TEU – that the negotiation could accommodate a whole range of UK preferences. As any representative of a European state that has negotiated an advanced form of integration with the EU will testify, there are limits to the negotiating flexibility of the EU. Principles, practices and precedents cast their shadows. Third, the associations will themselves cast a shadow over any negotiation, for whatever new settlement the UK secures – within or with the EU – it will set a precedent for what non-members involved in associations can legitimately claim from and expect of the EU.

Similarly, any new settlement will set precedents for existing and future members of the EU. In any negotiation with a future UK government on changing the nature, form and substance of UK membership, the United Kingdom's EU partners will be mindful of the practical and reputational implications for the evolving EU. It will also be conscious of the expectations – and opportunities – that any new form of membership might create for other current or would-be members. If ideas such as partial, affiliate, associate or limited membership are realised, they will set precedents.

*Drawing on an analysis of the evolution of association as an alternative to membership, the paper assesses the principled, practical and political limitations the EU faces – and imposes on itself – in offering an acceptable balance of rights and obligations to states not wishing to assume the mantle of full membership.*

### **Principles and Practice in Associate Status**

Throughout its existence the EU has demanded that acceding states subscribe to the full range of membership obligations contained in its constitutive treaties. Furthermore, acceding states would (eventually) have to take on the entire *acquis communautaire*. For early entrants, derogations and transition periods meant that adoption and implementation of the full *acquis* might not take place until some years into membership. More recently, with the 2004, 2007 and 2013 enlargements the emphasis has been on almost full adoption and implementation of the *acquis* no later than accession and increasingly in most instances well before accession takes place. Only once inside the EU, and during the course of subsequent treaty reform negotiations, have member states been able to secure opt outs. Significantly, these opt outs have been from new treaty provisions, not existing commitments. They also remain very much the exception not the rule. Consequently they are

limited in number and affect only a small number of member states, primarily Denmark, Ireland and the United Kingdom.<sup>1</sup>

This principled approach to the terms of accession is matched by a broadly consistent and demanding approach to associate status. This follows in part from the treaty provisions on association, which have in essence remain unchanged since they were inserted into the Treaties of Rome in 1957. Then, Article 238 TEEC stated that ‘The Community may conclude with a third State, a union of States or international organizations agreements establishing an association involving reciprocal rights and obligations, common action and special procedures’. Following some textual adjustments and a renumbering, Article 217 TFEU states that: “The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.”<sup>2</sup>

### **In developing an understanding of**

In contrast to many other areas of EEC activity, the Six were forced to deal with the question of association even before the Treaty of Rome entered into force. The Maudling negotiations on the creation of a European free trade area were already under way. Consequently, as Henig notes, there was a need to respond rapidly to external stimuli rather than proceed on the basis of an “*a priori* rationally conceived doctrine”.<sup>3</sup> However, what emerges from the early years of the EEC is not a coherent policy *per se*. Rather, reports and communications highlight minimum elements of an association while emphasising the flexibility of the concept. Moreover, the fact that unanimity was required for the conclusion of association agreements allowed the actual use of Article 238 to be determined by one member state. Also, there was a clear desire on the part of the EEC to ensure that priority was given to its development. Hence, a reluctance to define association and lay down a policy meant that the creation of associations with European countries would be as much subordinated to the position of individual member states and the internal dynamics of the EEC as to desire for establishing close ties with non-member states.

#### **2.2.1 The Interim Committee**

The first steps towards the formulation of a policy on association were taken by the Interim Committee set up in 1957 to co-ordinate the position of the Six in international organizations.<sup>4</sup> During its first meeting in October 1957, the Committee made clear that an association established under Article 238 could not be based simply on a free trade area involving the elimination of customs duties and quotas. Any agreement would have to involve further real integration, such as the co-ordination or harmonization of competition policies and the conditions of production, and

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<sup>1</sup> And of these, Ireland has only reluctantly opted out of arrangements relating to the free movement of people and justice and home affairs cooperation because of the position adopted by the United Kingdom and its Dublin’s preference to maintain the Common Travel Area arrangements that significantly reduce border controls on movements between the two states.

<sup>2</sup> The adjustment from ‘a third State, a union of States or’ to ‘one or more third countries or’ was introduced by the TEU. The dropping of the ‘s’ from ‘procedures’ is not recorded, but appears in the consolidated versions of the TEC and TFEU produced since the Treaty of Amsterdam. The plural has been retained in the French (and German) language versions of the consolidated TEC and TFEU.

<sup>3</sup> Henig (1971a), p. 6. See also Benoit’s comment that there was a “lack of sufficiently clear and courageous plans in the Community either for facilitating access to the Community of those other European states that has significant difficulties to overcome in joining or for providing a solid basis of reassurances that no serious difficulties would be created for those who chose to stay out.” See Benoit, Emile (1961), Europe at Sixes and Seven - The Common Market, The Free Trade Association and the United States, Columbia University Press, New York, p. 247. See also Weil (1970), p. 65.

<sup>4</sup> Lindberg (1963), p. 141; Groeben, Hans von der (1982), Aufbaujahre der Europäischen Gemeinschaft - Das Ringen um den Gemeinsamen Markt und die Politische Union, Nomos Verlagsgesellschaft, Baden-Baden, pp. 64-70.

deal with the problems of agricultural trade.<sup>5</sup> A more restrictive interpretation emerged in the so-called Okrent Report produced in October 1958. Accordingly, all associates would have to accept the validity of the objectives of the Treaty of Rome with regard to the principles of international trade, (paragraph 2). In addition, any association agreement with the OEEC “must not in any way prejudice either the content or the implementation of the Treaty of Rome”.<sup>6</sup> The sanctity of the Community’s treaty base and the determination of the Six not to compromise the decisions they had taken in agreeing to create the EEC were evident. Furthermore, all associates would have to accept the EEC as an evolving entity, and not expect to be able to restrict it in its evolution. Such views reflected those already expressed by Hallstein in his speech to the EP in March 1958. Here, he argued the association of other European states with the EEC should not compromise the level of integration reached by the Six.<sup>7</sup>

As regards the proposed content of an association – and Okrent was assuming a multilateral association with the OEEC – Okrent made it clear that any agreement must involve more than just the establishment of a free trade area. Its proposals envisaged the co-ordination of trade policies, measures designed to minimize the distortion of competition as resulting from privileged access to third markets, the pragmatic convergence of economic and financial policies, the adoption of rules governing competition, the harmonization of social conditions, the approximation of legislation, and the free movement of workers.<sup>8</sup> In addition the report suggested the inclusion in an agreement of various escape clauses and the establishment of institutions “analogous to those already existing in the O.E.E.C.”.<sup>9</sup> Clearly, the Six were united in seeing association involving more than just free trade in industrial goods. As to the content of association, Okrent clearly showed that, from the outset, the Six envisaged association stretching beyond a simple free trade agreement and involving genuine integration.<sup>10</sup>

### 2.2.3 The Commission’s First Memorandum

Despite the collapse of the Maudling negotiations in November 1958, the Council expressed its desire to “continue the efforts to establish a multilateral association” and called on the Commission to formulate a common position on association which would be acceptable to the member states.<sup>11</sup> The Commission’s report, known as the First Memorandum, was presented to the Council on 26

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<sup>5</sup> Lindberg (1963), pp. 141-142.

<sup>6</sup> Okrent (1958), paragraph 2. Support for such a principle was already well established within the Community.

<sup>7</sup> See EEC Commission (1958), points 147 and 154; Bauer Gérard F. (1963), “Europäische Integration und neutrale Staaten”, *Österreichische Zeitschrift für Außenpolitik*, Vol. 3, Nos. 3-4, pp. 154, note 30; Hollenweger (1967), p. 145.

<sup>8</sup> Okrent (1958), paragraphs 5-24 and paragraph 39.

<sup>9</sup> Okrent (1958), paragraphs 27-33. The OEEC institutional framework consisted of a Council, meeting at either ministerial level or at the level of permanent representatives, assisted by a Secretariat, and several Boards responsible for giving considered opinion and taking decisions where specifically instructed to do so. The Report suggested that the Commission be represented in the Council, and that a Court of Justice might be necessary. Decisions within the Council with the Community acting as a unit, should initially be taken on the basis of unanimity, although provision for majority decisions might be considered at a later date.

<sup>10</sup> The Commission, in its First General Report, written prior to the collapse of the Maudling negotiations, adopted a similar line to Okrent. It argued in favour of “a certain harmonization of the external tariffs or ... the establishment of countervailing duties”; “special provisions” for the UK’s system of Commonwealth preferences; “a solution which includes agriculture”, albeit not a common agricultural policy; the principle, on institutional matters, “that the proper functioning of the Common market must not be weakened or impeded by a looser association”. See EEC Commission (1958), points 156-159.

<sup>11</sup> Cited in Camps (1964), p. 184. Although the Commission was only set up mid-way through the free trade area talks and, as a result, only played a minor secondary role in formulating the position of the Six, this did not mean that it remained silent for the duration of the negotiations or that it did not wish to develop a role for itself in the process. On several occasions, the Commission made its own views clear, arguing strongly that an agreement with the OEEC should in no way prejudice the future development of the newly created Community. See Lindberg (1963), pp. 143-146.

February 1959.<sup>12</sup> In what Duchêne describes as a “bold ... far-sighted ... and shrewd” approach,<sup>13</sup> and Henig as “an amalgam of pious hope and mere verbiage”,<sup>14</sup> the memorandum reiterated Commission doubts about the possibility of reaching an agreement on a European free trade area given the heterogeneity of the seventeen OEEC states and their various interests.<sup>15</sup> Instead, a policy should be developed to deal with non-members as a whole.<sup>16</sup> Nevertheless, the memorandum recognized the importance of trade within Europe and the need to work towards establishing a European Economic Association.<sup>17</sup> However, this could only be achieved if an effective competition policy were adopted; provisions made for the free movement of workers, the liberalization of services and greater agricultural trade; policies relating to economic trends co-ordinated; an active development policy pursued; and distortions in competition resulting from differences in external tariff and trade policies kept to a minimum.<sup>18</sup> Moreover, all this would have to be placed within a world context and be carried out within international organizations.

Although these preconditions for a multilateral association clearly exceeded those which the remaining members of the OEEC were willing to accept, the memorandum made it clear that the EEC was prepared to enter into bilateral or multilateral negotiations, not necessarily within the OEEC framework, towards either membership or association.<sup>19</sup> On the actual question of association, the Commission outlined in the memorandum what it saw as the possibilities for such a relationship:

Association does not create such close links [as membership]. *The essential advantage of this system is its great flexibility.* Firstly, it allows for both multilateral and bilateral association. Secondly, *it allows for all solutions:* those which adopt only certain provisions of the Treaty of Rome, and those which take over that instrument almost in its entirety. Furthermore, the system makes it easier both for the country applying for association and for the Community to draft special clauses exactly adapted to the situation of the country in question and to the relations which it already has with the Community. Finally - and this is perhaps the essential difference - the associate country retains its full individuality on the political plane. The pledges which such a country would give in return for certain facilities, like any other commitment to which it subscribed, would be of a contractual nature and it would put them into operation by its own independent action.<sup>20</sup>

Although this view of association, highlighting its flexibility, may appear to have held out the opportunity of a simpler arrangement than that which the EEC was proposing for the OEEC as a whole, the conditions laid down for the European Economic Association should not be ignored. Even if a European country were to have taken up the offer to bring Article 238 into play, a simple free

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<sup>12</sup> EEC Commission (1959a), First Memorandum of the Commission of the European Community to the Council of Ministers of the Community (pursuant to the decision of 3 December 1958), concerning the problems raised by the establishment of a European Economic Association, Brussels, 26 February. For a discussion of the Memorandum, see Camps, Miriam (1960), Division in Europe, PEP Occasional Paper No. 8, London, pp. 13-16; Bauer (1963), pp. 155-156; Jessorich (1963), pp. 40-45; Lindberg (1963), pp. 146-151; Camps (1964), pp. 184-188; Henig (1971a), pp. 26-28.

<sup>13</sup> Duchêne (1994), pp. 321-322.

<sup>14</sup> Henig (1971a), p. 27.

<sup>15</sup> EEC Commission (1959a), point. 5.

<sup>16</sup> EEC Commission (1959a), points. 16-17.

<sup>17</sup> EEC Commission (1959a), points 62-70.

<sup>18</sup> EEC Commission (1959a), point 33.

<sup>19</sup> “Any European countries already anxious to go further in economic integration and to benefit more rapidly from its [the Community’s] machinery are free to bring into play Articles 237 and 238 of the Treaty of Rome”, EEC Commission (1959a), point 85. It is the view of Yardas (1966), pp. 34-35, that the EEC here was hoping “to win other countries to the EEC form of integration and thereby to prevent the formation of E.F.T.A.”. Groeben (1982), p. 67 maintains, however, that de Gaulle had no desire to see an EEC-UK association established for fear that this could prevent France using the Community as the basis for French-led political cooperation in Europe.

<sup>20</sup> EEC Commission (1959a), point 87 (emphasis added).

trade area solution would have been unacceptable to the EEC. Some form of genuine integration would have had to have taken place.

Within the Council, reactions to the memorandum were mixed and generally inconclusive. While the French welcomed the Commission's arguments, the other five member states tended to regard the memorandum's conclusions as too negative.<sup>21</sup> Indeed, Camps argues that there was "considerable annoyance" with the Commission for failing to define the basis for negotiations within the other OEEC states as required in its mandate.<sup>22</sup> As a result, it simply "took note" of the memorandum, reaffirmed its desire to see a multilateral OEEC-EEC arrangement established, and instructed a special committee, comprising representatives of the member states and the Commission, to study the memorandum and report back.<sup>23</sup> The Special Committee, chaired by Commissioner Rey, met in April, May and June 1959 against a background of increasing French opposition to a Europe-wide free trade area.<sup>24</sup> However, before the Committee had produced any findings, the Commission embarked on a new initiative.

#### 2.2.4 The Commission's Second Memorandum

On 22 September 1959 the Commission presented a Second Memorandum to the Special Committee.<sup>25</sup> This reiterated the main arguments of the First Memorandum and acknowledged that the failure to reach unanimous agreement within the EEC on how to resolve the problem of relations with the OEEC was causing a sense of uncertainty in industrial and commercial circles. In response, it proposed pursuing solutions to the problem of European trade within a more global context in GATT, dealing with specifically European problems through special "contact" committees, and promoting a concerted policy towards underdeveloped countries thorough regular consultations with the United Kingdom and the United States.<sup>26</sup> Thus, in line with French thinking and with the apparent encouragement of the United States, the Commission was effectively advocating abandonment of a purely European trade arrangement.<sup>27</sup> Although the Commission was at pains to

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<sup>21</sup> Lindberg (1963), pp. 151-152; Henig (1971a), p. 17. See also Luif (1986), p. 9.

<sup>22</sup> Camps (1960), p. 15; Camps (1964), p. 188.

<sup>23</sup> "Resolution of the Council of the EEC, 19 March 1959", cited in EEC Commission (1959a), p. 42. See also Lindberg (1963), p. 152. Indeed, as Camps (1964), p. 189 argues, the fact that the committee included representative of the members states was "a sign of the general dissatisfaction" with the First Memorandum.

<sup>24</sup> Lindberg (1963), pp. 153-154.

<sup>25</sup> EEC Commission (1959b), Memorandum from the Commission to the Special Committee for the Study of problems concerning a European Economic Association, I/COM(59)123 rev, Brussels, 22 September. For a discussion of the Memorandum and the circumstances in which it was produced, see Camps (1960), pp. 17-25; Lindberg (1963), pp. 154-156; Camps (1964), pp. 197-199.

<sup>26</sup> EEC Commission (1959b), p. 2 and p. 7.

<sup>27</sup> Indeed, Henig (1971a), p. 28 argues that the Second Memorandum contained a "straightforward assertion that the immediate formation of any kind of European Economic Association was impossible". The shift in emphasis towards a global solution to the problems of trade and also the praise the memorandum bestowed on the US is seen by Beugel as evidence that both the memoranda were written "for American eyes", the Commission recognising in US and French support "an alliance for victory". See Beugel, E.H. van der (1966), From Marshall Aid to Atlantic Partnership: European Integration as a Concern of American Foreign Policy, Elsevier, Amsterdam, pp. 341-342. Camps (1960), pp. 18-20 provides five reasons for the hardening of the Commission's position against a European association, concluding that in drafting the Memorandum it had the impact on the United States "very much in mind". The reasons advanced were: the need to prioritize making the EEC irreversible; the belief that free trade only makes economic sense as part of an economic union; the evidence in the Stockholm Plan for a European Free Trade Area that the Seven were only willing to negotiate in terms of a free trade area; the concomitant that UK enthusiasm for an arrangement with the EEC was waning; and the worsening US balance of payments position. See also Camps (1964), pp. 192-197. By contrast, with regard to EFTA, the EP's Committee on Commercial Policy believed that the Stockholm Convention could improve the chances for creating a European Economic Association. See Martino, Gaetano (Rapporteur) (1960), "Rapport à l'Assemblée Consultative du Conseil de l'Europe sur l'activité de l'Assemblée Parlementaire Européenne du 1er janvier 1959 au 1er mars 1960", Assemblée Parlementaire Européenne - Documents de Séance, No. 26, 14 June, point 72. For an economic assessment arguing that the creation of EFTA "would probably lessen rather than weaken the feasibility of



invoke a liberal trade policy for the EEC, it was becoming increasingly clear that prospects for a European trade arrangement were becoming dimmer.<sup>28</sup>

Reaction to the Second Memorandum was mixed with Germany and the Benelux countries clearly retaining their enthusiasm for a European free trade arrangement against French and Commission opposition. All the same, and in the knowledge that the United States endorsed the Commission's approach, the Council accepted the Memorandum's main points in November 1959.<sup>29</sup> While a contact committee involving the EEC and representatives of the Seven was subsequently established, it was clear from the memoranda that relations with the rest of Europe were losing their prominence on the EEC's political agenda.<sup>30</sup> Confirmation of this had already come in October 1959 when the Six agreed to accelerate the timetable for integration within the EEC. Evidently, the chances that Article 238 would be used as the basis for close ties with other European states were fading rapidly.

## The Birkelbach Report

The first significant statement on what form or forms an association could take came from the Commission in a 'First Memorandum' presented to the Council on 26 February 1959.

Association does not create such close links [as membership]. The essential advantage of this system is its great flexibility. Firstly, it allows for both multilateral and bilateral association. Secondly, it allows for all solutions: those which adopt only certain provisions of the Treaty of Rome, and those which take over that instrument almost in its entirety. Furthermore, the system makes it easier both for the country applying for association and for the Community to draft special clauses exactly adapted to the situation of the country in question and to the relations which it already has with the Community. Finally - and this is perhaps the essential difference - the associate country retains its full individuality on the political plane. The pledges which such a country would give in return for certain facilities, like any other commitment to which it subscribed, would be of a contractual nature and it would put them into operation by its own independent action (Commission of the European Economic Community, 1959: 87).

contribution from within the EEC to thinking on the terms of association came in 1961 with the drawing up of the Birkelbach report by the Political Committee of the European Parliament. Although the EP at this point was not a key EEC institution and the report was not an official statement of policy, it was generally welcomed within the Commission and certainly not rejected by any of the member states. The Commission President, Walter Hallstein, indicated that he was in almost total agreement with its content (Nemschak, 1963), despite the restrictive nature of its findings. Henig (1971: 37-38) suggests that some of the Report's content was inspired by people

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an all-European free trade area", see Kreinen, Mordechai E. (1960), "The 'Outer Seven' and European Integration", *American Economic Review*, Vol. 50, No. 3, pp. 370-386.

<sup>28</sup> The effective abandonment of a European free trade arrangement was underlined further by the likes of Rey in 1960. See his comments in Rey (1960), pp. 436-437. Rey also argues (p. 441) that a European economic association could not be created until after the EEC had introduced its common external tariff and was conducting a common trade policy. However, in line with the emphasis being placed on pursuing a more global approach to the issue of free trade in Europe, Rey did not exclude for ever (p. 438) the possibility of an association between the EEC and its European and Atlantic partners.

<sup>29</sup> Camps (1960), p. 24; Lindberg (1963), pp. 156-160; Camps (1964), pp. 199-202.

<sup>30</sup> The prospects for an OEEC-wide free trade arrangement were also being reduced by the different perceptions of the form such might take. Whereas the Six spoke in terms of a "multilateral association" with the EEC at its centre, politicians in the Seven (in particular, the United Kingdom), showed a clear preference for a "multilateral solution" whereby the EEC and the Seven would be equal partners in a new Europe-wide agreement. See Jessorich (1963), pp. 47-48 and pp. 106-109.

working in the Commission and the Report reflected 'almost uncannily' some of the known ideas of Hallstein.

The report acknowledged the potentially far-reaching and wide-ranging nature of association, but favoured membership as the norm for European countries (*ibid*: point 84-5). Association with those countries unable or unwilling to become members, it was argued, contained various dangers. In creating various associations, the EEC would run the risk of undermining its capacity to survive and develop (*ibid*: point 93). It was assumed that applicants sought association essentially for reasons of economic self-interest and without appreciating the political implications of such a relationship. Given its predominantly political character, it was not possible for the Community to enter into an association unless the country concerned not only accepted, but also contributed towards the EEC's political goals. Hence, trade issues should be dealt with in GATT. Where an applicant wished to establish an association covering issues beyond trade, such an arrangement would have to contain a balance of benefits and obligations. However, given that the member states had given up certain rights in order to receive the benefits of membership, it would be inappropriate to grant similar benefits to associates unless they were willing to make concessions themselves. Consequently, the idea that potential associates could pick and choose what they wished from the Community menu was unacceptable (*ibid*: points 89-91).<sup>31</sup> At the core of any association would be trade relations. However, the report expressed considerable caution over whether free trade could be established since this would cause problems for the EEC, particularly concerning rules of origin. Moreover, as had been argued at the time of the Maudling negotiations, a free trade area would provide non-member states with many of the advantages of membership without the same states having to assume any of the obligations or burdens of membership (*ibid*: 106-107). So, any association would have to be based on a customs union as a minimum. In fact it should not only involve the adoption of the CET but also cover other policy areas, specifically competition policy and fundamental elements of economic union. Moreover, an association would clearly be dynamic and lead to economic convergence between the EEC and the associate. It would thus be ideal for those wishing ultimately to become members (*ibid*: points 100-103). Moreover, in order to maintain uniformity and discipline, it was pointed out that associates would most likely have to abide by EEC decisions although they would not be granted an equal say in the Community's decision-making processes (*ibid*: point 105). Nevertheless, an institutional framework, including parliamentary contacts would be necessary.<sup>32</sup>

For states seeking association in the 1960s the Birkelbach Report adopted a very narrow and unaccommodating perspective on association. A balance of rights and extensive obligations was envisaged; and in exchange there would be little on offer institutionally. Special procedures mean just that – special procedures – and no access to the EEC's institutions or decision-making procedures. As for the common action, the associate would be acting alongside the EEC. From an EEC perspective, however, Birkelbach's conclusions were justified. The EEC was still in its formative years and so association should be avoided since it could water down the Community's political vocation. Hence, although many in the Commission and the EP were not opposed to association *per se*, they were reluctant to enter into any arrangements which might retard or even threaten the EEC's development.<sup>33</sup>

### The Blaisse Report

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<sup>31</sup> This idea is occasionally referred to as the "raisins theory" from the German phrase "*sich die Rosinen aus dem Kuchen picken*" (to pick the raisins from the cake).

<sup>32</sup> The report also noted (points 120-1) that the Community could face logistical problems with regard to institutions if a large number of associations were established.

<sup>33</sup> Neunreither (1964), pp. 50-51.

In contrast to Birkelbach's essentially restrictive approach, a second EP report, this time from its Committee on External Trade, appeared more accommodating. The 1963 Blaisse report, while only devoting minimal space to the issue, noted that association was possible

for countries which, though unable or disinclined to join the Community, are nevertheless prepared to play their part in the integration process by harmonising their economy with that of the Community to a really appreciable extent.<sup>34</sup>

Hence, the report argued in favour of opening negotiations with the neutral countries which had applied in 1961 (4.2.1). However, with regard to the content of an association, the report echoed the Commission memoranda in stressing that the minimum should be a customs union with common policies in some areas. With regard to the Birkelbach report, Blaisse wholeheartedly endorsed its conclusions regarding the political and institutional aspects of association.<sup>35</sup> A consensus on association, at least among EEC institutions, was emerging.

### **The Interlaken Principles**

The prevailing consensus post-Birkelbach that .... was never formally been recorded. Nor has it been recorded since. However, it was evident in the arrangements for association contained in the first association agreements that the EEC concluded with Greece (1961) and Turkey (1963).

The spirit of Birkelbach was also in evidence when the European Community and the then seven members of the European Free Trade Association (EFTA) began to upgrade their relations in the 1980s. A Commission communication on implementing the Joint [Luxembourg] Declaration agreed by EC and EFTA ministers on 9 April 1984 identified four principles that should be observed in the development of relations:

- a) Community integration and ... [the Community's] independent power of decision must under no circumstances be affected.
- b) The elimination of technical barriers to trade and the simplification of administrative formalities at Community-EFTA frontiers are a logical extension of the Free Trade Agreements and should be pursued parallel to the progressive integration of the Community's internal market.
- c) No specific field should be excluded a priori for cooperation. The Community must, for example, also step up coordination with EFTA countries in fields such as transport or environmental policy, which of their nature cannot *be* limited by frontiers and are also issues of great concern to ordinary people.
- d) It will only be possible to progress towards achievement of a wider European market if the costs and benefits involved are shared equally. Measures taken in parallel must involve real reciprocity' (Commission of the European Communities, 1985: point 5).

The first and last of these would soon feature in the – often forgotten – Interlaken principles that the Commissioner for External Relations, Willy de Clercq, set out in a meeting in Interlaken of ministers from EC and EFTA member states on 20 May 1987. As far as the Commission was concerned, the development of EC-EFTA relations – a process that would ultimately lead to the establishment on 1 January 1994 of the European Economic Area (EEA) – would be governed by three principles:

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<sup>34</sup> Blaisse, P.A. (Rapporteur) (1963), "Report on behalf of the Committee on External Trade on the common trade policy of the EEC towards third countries and on the applications by European countries for membership or association", European Parliament Working Papers, No. 134, 26 January, point 35.

<sup>35</sup> Blaisse (Rapporteur) (1963), points 44-45.

- priority for the EC's own internal integration
- the safeguarding of full decision-making autonomy for the EC
- a balance of benefits and obligations would be maintained (*Agence Europe*, 1987)

None of the principles would have caused any surprise among EFTA member states. According to a senior Commission official, the EC in its relations with the EFTA countries had for a long time been consistent in its insistence on respect for its autonomy (Hayes, 2011: 22). According to a Finnish official: 'anything else "would have been rather odd"' (Kuosmanen, 2001:7).

The third Interlaken Principle – of reciprocity and a balance between rights and obligations – was well-known too, not least from the provisions on association contained in Article 238 TEC. Consequently there appeared to be no notable opposition within the EC to the principles being adopted. As much was made clear by the member states when the General Affairs Council on 20 July 1987 endorsed the principle by recording 'its full support to the guidelines for future co-operation agreed on at the Interlaken meeting between the Commission and EFTA Ministers (May 1987) and to the principles on which co-operation between the Community and EFTA were based' (Council of the European Communities – General Secretariat, 1987: 7).

Although subsequently, Jacques Delors, President of the Commission, referred in a speech to the EP in January 1989 to the possibility of 'more structured [EC-EFTA] partnership with common decision-making and administrative institutions', thereby suggesting that the EC was willing to compromise on its decision-making autonomy, the Commission's language quickly shifted to 'decision-shaping'. Delors reference to 'decision-making' was inadvertent. Moreover, as exploratory talks soon revealed, it was clear that the EC was never going to accept the EFTA desire for 'genuine common decision-making mechanism' whereby the membership of relevant EC decision-making bodies would be increased from 12 to 19 delegates the purpose of adopting decisions relating to the EEA. The EC was, according to EP researchers, 'adamant that its decision-making autonomy must not be compromised ... [its] insistence on the principle of autonomous internal decision-making excluded any form of intervention by non-member states outside the Community structure' (European Parliament Directorate-General for Research, 1993: 12).

It could have surprised few, therefore, that the ECJ in its opinion (Opinion 1/91) on the initial version of the Agreement establishing the European Economic Area, upheld the institutional autonomy of the EC by objecting to the structure and competences of a the proposed EEA Court comprising ECJ and EFTA judges. Its argument was that the legally binding interpretations of an EEA Court could adversely affect the autonomy and exclusive jurisdiction of the ECJ. Consequently it ruled that the 'system of judicial supervision which the agreement proposes to set up is incompatible with the Treaty establishing the European Economic Community' (Opinion 1/91: \_). Revisions to the EEA Agreement were duly negotiated, the outcome of which was that the EEA court was abandoned in favour of *de facto* ECJ jurisdiction over the EEA.

In line with the principle of the safeguarding the full decision-making autonomy for the EC, no provision was made for judges from the EFTA states to sit on the ECJ for matters concerning the EEA. Nor did the EEA Agreement provide, despite the obligation to take on future legislation to ensure the homogeneity of the EEA, for any direct participation of officials, ministers or parliamentarians from the EFTA states in the activities of the Commission, Council or Parliament. Instead, officials from the EFTA states would be involved in a consultative decision-shaping mechanism.

See Gould (2008) on limitations ...

The insistence of the EC – now EU – on upholding the principles set out at Interlaken was also evident in the new associations being created thorough the Europe Agreements with the countries

of Central and Eastern Europe. Following the precedents set by earlier bilateral association agreements, for example those with Greece and Turkey, these involved ...

The Europe Agreements understandably attracted criticism, not least because they failed to offer the clear membership perspective that the countries of Central and Eastern Europe desired. They also failed to create a sense of involvement in the mainstream process of post-Cold War European integration. The EU was failing to facilitate the countries' 'return to Europe'. Such shortcomings were eventually addressed in through decisions of the European Council at Copenhagen in June 1993. It not only issued a commitment to admit the countries of Central and Eastern Europe – 'the associated countries in Central and Eastern European Europe that so desire shall become members of the European Union' – it also launched a novel 'structured relationship' with these countries that would involve a 'reinforced and extended multilateral dialogue' conducted through advisory meetings between the Council and the countries concerned on matters of common interest, including those with 'a trans-European dimension, including energy, environment, transport, science and technology' the common foreign and security policy, and justice and home affairs (Conclusions of the Presidency, 1993: 7.A.iii and Annex II). This structured multilateral dialogue – which was sustained until 1997 – was unprecedented; no non-member state or group of non-member states had previously been offered the opportunity to attend regular formal dialogue meetings with members of the Council. Dialogue was generally restricted to bilateral association bodies, such as Association Committees, Association Councils and Parliamentary Association Committees.

### New Forms of Membership

Of the new forms of membership mentioned, the first to be proposed was 'affiliate membership' in 1991. The idea is associated with Frans Andriessen, then Commissioner for External Relations, and was aimed at the 'new democracies' of Central and Eastern Europe and 'long-standing partners' of the EC (Andriessen, 1991a). The novelty of proposed arrangement was it would provide affiliate members with 'a seat at the Council table on a par with full members in specified areas, together with appropriate representation in other institutions, such as the Parliament'. Furthermore, Andriessen envisaged affiliate members taking part 'fully' in foreign policy decisions coming within the Community sphere and having 'a link with the European Monetary System and with the progressive stages through which economic and monetary union is to be achieved'.<sup>36</sup> Moreover, affiliate membership could be extended to EC activities in diverse areas, such as 'transport, energy, the environment, research and development' with the precise coverage 'to be agreed on a case by case basis'. The outcome would be that each country could pursue integration 'according to its capacities and needs'.

A few weeks after launching the idea of affiliate membership, Andriessen offered some further clarification of what it might entail (Andriessen, 1991b). Affiliate membership would be a 'special kind of membership' enabling countries concerned 'to contribute to policy formulation in areas considered to be common European interests'. This could involve the consultation of affiliate members through 'enlarged sessions' of the Council and the EP. The range of issues now included telecommunications, environmental standards, and Europe's 'common cultural heritage'. Andriessen also suggested that affiliate members could peg their exchange rate to the ECU thus 'giving rise to new forms of cooperation'.

Andriessen's idea of affiliate membership – which he also referred to as associate membership (see Andriessen, 1991b) – failed to attract support, not least because many EC officials viewed the idea as

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36 On participation in foreign policy decisions, Andriessen did acknowledge that neutrality might arise as a problem in the context of security-related decisions. He responded that 'this question already exists in the Community of Twelve and a flexible formula could allow for occasional opting out'.

unworkable and the governments of the countries of Central and East Europe viewed it as an unacceptable offer of 'second-class' membership (Smith, 2005: 761). Undoubtedly some of those with misgivings about the idea would have been concerned at how, if implemented, it would seriously question the sanctity of principle that the full decision-making autonomy for the EC be safeguarded

## EEA-plus

### Partial Membership

According to Emmanouilidis (2008: 11-12), '*Partial Membership* transcends both the association and the classical enlargement paradigm. In the framework of *Partial Membership* affiliated countries are not merely associated but rather integrated in one or more specific EU policy areas without however becoming full members of the European Union. Sectoral integration can relate to political (e.g., CFSP/CSDP, Schengen<sup>25</sup>, visa regime) and/or economic aspects (e.g., internal market, energy and climate policy, euro). It can involve policy areas, which include all EU countries, or areas, which are subject to a high level of differentiation among member states. "Partial" members become *de facto* members in the respective field and as such fulfil similar obligations and enjoy similar rights as any other EU country. Accordingly, "partial" members would be obliged to contribute to the policy-relevant budget and at the same time enjoy partial access to the Union's core institutions. Over time, *Partial Membership* can be extended to other policy areas and would not exclude the possibility of an eventual full membership in the EU.'

From the perspective of a country aspiring to join the EU, the concept of *Partial Membership* offers one great advantage: Contrary to an *Association Plus*, "partial" members take part in or at least have the ability to (strongly) influence the Union's decision-making process from the

inside. Countries participating in a certain policy field take part in deliberations and have a strong involvement and say regarding issues related to the respective (sub-)policy field.

"Partial" members are not degraded to mere recipients of the EU's *acquis*, but are able to actively and directly co-determine the EU's political and legal decisions from within the Union's institutional architecture. Sectoral members are thus attributed a substantive dimension of EU membership, which was hitherto reserved to full EU members. Representatives of "partial" members would take part in the ordinary meetings of the relevant EU institutions and bodies. In more concrete terms, the participation of "partial" members in

#### Draft Article 50 TEU

1. Any Member State which continues to respect the values referred to in Article 2 and is committed to promoting them may notify the European Council of its intention to become an associate member of the Union. The negotiations shall be conducted by the Commission on the basis of a mandate agreed by the Council, after consulting the Parliament.

2. The conditions of associate membership and the adjustments to the Treaties on which the Union is founded shall be the subject of an agreement between the Member States and the Associate Member State. The agreement shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after consulting the Commission and after obtaining the consent of the European Parliament. The agreement will enter into force once it has been approved by the Member States and the Associate Member State in accordance with their respective constitutional requirements.

(Duff, 2012: 68-9)

the three main EU organs – (European) Council, European Parliament, European Commission  
– could be organized as follows:

*(European) Council:* Representatives of the “partial” members take part in European Council summits and in the meetings of the various formations of the Council and its substructures (working groups and committees, COREPER, PSC etc.) – when decisions relevant to the respective policy area(s) are deliberated. The representatives of “partial” members would have at least the right to express their point of views. Beyond this undeniable right to put forward a national position, one would have to clarify, whether the “partial” members have no voting right, some sort of veto or suspensive veto, or even equal voting rights when decisions in the respective (sub-)policy field are taken. The participation rights of the “partial” members must not be uniform, but could rather vary from policy area to policy area.

- *European Parliament:* Parliamentarians of the “partial” members participate in the deliberations of the European Parliament when issues related to the specific (sub-)policy area are debated and relevant decisions are taken. Commensurate to full EU members, the number of parliamentarians would be determined in a degressively proportional relation to the population size of the “partial” member. The representatives of the “partial” members could either be seconded national parliamentarians or “European parliamentarians” elected in a separate election. Again, one would have to resolve whether the representatives of the “partial” members would be limited to an active observer status, which would assign them the right to express an opinion but exclude the right to participate in a vote, or whether they would enjoy similar or even equal rights as the “ordinary members” of the European Parliament.<sup>30</sup>

- *European Commission:* Based on the institutional logic of the European Union, one could argue that it is not obligatory that the “partial” members are represented in the Commission. Two arguments justify this position: (i) The Commission is a supranational organ called to be “completely independent” and to “promote the general interest of the Union” and not the interest of any particular member state(s). Commissioners should not first and foremost be national representatives, but rather members of a supranational college, who “shall neither seek nor take instructions from any Government”. (ii) Following the coming into force of the Lisbon Treaty and as from November 1, 2014, the number of Commissioners will be smaller than the number of member states. As a consequence, even full EU members will not always have the right to nominate one of their nationals to become member of the European Commission. The “partial” members will thus not be the only ones, who are not “represented” in the Brussels college.

Concerning participation in the EU’s bureaucratic structures, “partial” members could be represented in the relevant administrative services of the Commission (i.e. the relevant Directorates-General), the General Secretariat of the Council, the administration of the European Parliament, the new “European External Action Service”, or in all relevant EU agencies.

The institutional details of a *Partial Membership* would have to be codified in writing. Two options seem feasible: (1) The EU and the “partial” member conclude, sign and ratify a bilateral agreement/treaty laying down the specific institutional details of their partnership. (2) The terms of *Partial Membership* – including the overall institutional set-up – are generally defined and legally codified in the EU Treaties. The latter would require a revision of the Union’s primary law on the grounds of the ordinary revision procedure.<sup>31</sup>

Limited Membership

### **(3) Limited Membership**

The concept of *Limited Membership* follows the logic of the enlargement paradigm. But the acceding state becomes an EU member subject to certain limitations. The new EU country does not enjoy all benefits of membership as it is excluded from certain (key) policy areas (e.g., Schengen, ESDP/CSDP, “four freedoms”, euro) or is not obliged to apply certain legal

norms (e.g., differentiated *acquis* via *enhanced cooperation*, opt-out). In the past, the EU and

the acceding countries agreed that new members must from day one of their accession respect the Union's *acquis* and fulfil all obligations deriving from EU membership. In other words, European law was valid right from the beginning although its application was in certain

cases temporarily delayed, due to either derogations laid down in the accession treaty (e.g., transition period concerning the free access of labour markets), or due to the fact that the new

EU countries were not (yet) able to fulfil certain pre-defined participation criteria or obligations

(e.g., late introduction of the euro, no immediate abolition of border controls).

The notion of *Limited Membership* deviates from this rule as new member states are more permanently excluded from one or more (sub-)policy areas or parts of the EU's *acquis*, if both

parties – the Union and the acceding country – agree to the respective exemption in the course of membership negotiations. Beyond such selective exceptions, the new member states would enjoy all legal rights and obligations deriving from EU membership. Institutionally,

the new EU country would be fully and equally represented in every EU institution. However, in

the affected (sub-)policy fields “limited” members might not enjoy the same institutional rights as EU countries not subject to any membership limitations (e.g., no participation in the Eurogroup; no voting rights in certain forms of *enhanced cooperation*).

The exclusion of new member states from certain parts of the *acquis* can alleviate and speed up the accession of new member states. Such exemptions can make it politically easier for certain countries to join the EU by removing national obstacles on the road to EU membership (e.g., potential opt-out of Switzerland concerning ESDP/CSDP or tax harmonisation);

- allow a more rapid integration of states which otherwise would not (yet) fulfil all prerequisites for joining the Union;

- reduce certain reservations in the “old” member states towards the accession of a certain country to the EU by e.g., restricting the acceding country's access to the EU labour market or to structural or agricultural funds. The current Turkish case leads in this direction: The EU's Negotiating Framework for Turkey includes the possibility to negotiate long-term derogations. It explicitly mentions “permanent safeguard clauses i.e. clauses which are permanently available as a basis for safeguard measures” in areas such as the free movement of persons, structural policies or agriculture.<sup>3</sup>

The introduction of *Limited Membership* would lead to new sub-forms of membership and citizenship. The “limited” members would not enjoy the same rights and privileges as older EU

countries and their citizens. One could argue that such forms of “second-class” membership or

citizenship are nothing new. Some of the older EU members such as Denmark and the UK concerning the euro, Denmark, Ireland and the UK concerning Schengen, Denmark in the defence field of ESDP/CSDP or the UK and Poland concerning the Charter of Fundamental Rights are also not (fully) applying all parts of the EU's *acquis*. However, there are two important differences between both cases: First, Denmark, Ireland, Poland or the UK had themselves decided to restrict their membership status. Second, they had been able to codetermine

the specific conditions of their partial exemption as they were already in the strong position of a full-fledged member of the EC/EU. In contrast, the acceding countries would in most cases become “limited” members not on their own will, but rather due to the pressure from older member states. Most “limited” members would have to accept the limitations to their



membership, if they want to gain accession to the club.

The notion of being a second-class member can lead to severe tensions between old and new EU countries, if over time the latter feel discriminated by the former. The notion of being discriminated can fuel anti-EU sentiments in the new member states and put pressure on the ruling political class to improve their countries' membership status in the Union. As a result, "limited" members could compel fellow EU members to remove the remaining membership restrictions. The ability of the "discriminated" new EU countries to exert pressure on the older member states will depend on their power position within the Union. As "limited" members would be fully integrated into the EU's institutional framework, they would be able to exert strong pressure on their partners. In case both sides clash, the resulting rupture between old and new EU members could negatively affect the Union's internal and external ability to act and even impede the EU's structural development.

As a consequence, the concept of *Limited Membership* makes sense only, if it is conceived and construed as an intermediate step towards a full-fledged unlimited membership.

Exemptions from certain (sub-)policy areas or from parts of the *acquis* should not be eternal. The accession treaty should include predefined mechanisms and procedures allowing for the abatement of certain membership limitations. The eradication of restrictions should be subject

to a decision of the Council taken by qualified majority and not by consensus. No single EU member or small number of states should be able to veto the gradual inclusion of a new member state in all policy areas.

As emmXX argues:

**'Increased differentiation among EU members will increase the likelihood that alternative forms of membership might be implemented in practice.'**

If the degree of differentiation within the EU increases one will witness more flexible forms of membership. The Union has already entered that path as some EU countries are excluded from core policy areas such as Schengen, the third stage of EMU, or the military aspects of ESDP/CSDP. In case differentiation among EU members becomes more intense, the boundaries between full membership, *Limited Membership*, *Partial Membership* or *Association Plus* will become increasingly diffuse. And the more differentiated the EU becomes, the higher the chances that neighbouring countries might be affiliated beneath the level of full membership. Here some reasons or scenarios which support this argument:

- *Increased acceptance of membership minus*: Increased differentiation among EU countries will make it less problematic for affiliated countries to accept a status below full membership. New EU members will be more ready to accept limitations to their membership status, as old EU members do also not participate in all policy areas on an equal basis.

- *Introduction of Partial Membership following voluntary withdrawal*:<sup>33</sup> Following a voluntary withdrawal of an EU country, *Partial Membership* might offer both sides a way how to re-organize the relationship between the former EU member and the Union. As a matter of fact, the perspective of *Partial Membership* might even make it easier for a country to exit the Union as it offers the possibility to remain closely affiliated with the Union. If *Partial Membership* is introduced into EU practice, it might offer a viable way for affiliating neighbouring countries beyond a mere association.

- *Limited Membership as differentiated acquis not binding for new members*: The perspectives for *Limited Membership* would increase if a group of EU members deepens its level of cooperation and acceding states are not obliged to implement this "differentiated *acquis*". The differentiation instrument of *enhanced cooperation* provides a concrete example: In case a group of EU members decides to apply the instrument of *enhanced cooperation*, the level of differentiation between new and old EU members might increase substantially. This has to do with the fact that acts and decisions

adopted in the framework of an *enhanced cooperation* do not form part of the EU's overall *acquis* which "has to be accepted by candidate states for accession to the Union" (Art. 44.1. TEU-N; Art. 20.4 Treaty on the Functioning of the European Union (TFEU)). New members would thus join the Union without implementing the "differentiated *acquis*" adopted in the framework of enhanced cooperation. Past experience has shown that differentiation within the EU increases the chances that new member states do not participate in certain policies (e.g., introduction of euro, abolition of border controls within Schengen) – at least not immediately after EU accession.

In 2012 suggestions were being made that partial membership be offered to Turkey instead of the underdeveloped 'privileged partnership' to which Turkey had long been voicing opposition. Critics rightly maintained that the existing EU-Turkey relationship already amounted to partial membership, given the levels of integration involved in the customs union (see Yurttagül, 2012). Moreover, the concept of partial membership could just as easily be applied to certain members outside the eurozone and Schengen.

### Associate Membership

More recently, the notion of associate membership has been revived. At the urging of Andrew Duff MEP, the European Parliament's Committee on Foreign Affairs in September 2012 in its latest report on enlargement recommended that 'at the next general revision of the Treaties ... [it] should initiate a discussion on the introduction of a new category of associate membership of the Union' (European Parliament, 2012a: 38).<sup>37</sup> According to Duff, a new Article 49a TEU should be drafted to sit alongside the existing provisions for accession to (Article 49 TEU) and withdrawal from (Article 50 TEU) the EU.<sup>38</sup> Although motivated by various enlargement-related desires – e.g. to provide an interim form of membership to the likes of states seeking to join the EU for states, or an upgrade to those intent on remaining outside the EU – Duff argues that 'associate membership' could be offered to the United Kingdom as it seeks to loosen its ties with the EU (Duff, 2013a).

Duff's proposal of associate membership would require 'fidelity' to the EU's values and principles contained in Article 2 TEU as well as to the principle, of sincere cooperation set out in Article 4(3) TEU. In terms of policy engagement, conditions would be determined on a 'case by case basis', depending not least on whether a state was seeking to accede or leaving the EU. However, but associate membership would have at its core the EU's customs union. It would therefore extend beyond the 'free trade area' framework for the free movement of goods that is a core feature of the single market to involve the adoption by the associate member of the EU's Common External Tariff and, by implication, its Common Commercial Policy. More generally on the internal market, participation need not be full, but should not risk the internal market's operation. Participation in the EU's external action and international agreements concluded by the EU would also be open to the associate member, although again only in so far as the former's cohesion and the scope of any

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<sup>37</sup> Although endorsed by the Committee on Foreign Affairs, the recommendation did not secure the support of MEPs generally and so did not feature in their Resolution of 22 November 2012 on Enlargement: policies, criteria and the EU's strategic interests (European Parliament, 2012b)

<sup>38</sup> Duff and others have proposed that the article be drafted by a convention to be called in 2015 following the 2014 EP elections. Duff previously proposed the establishment of 'associate member' status during the European Convention in 2002-03. Associate members would be those democratic non-member states to which the EU had extended provisions of the constitution of Duff's proposed *Federal Union of Europe* (European Convention, 2002). Associate membership would also be open to any existing EU member state deciding not to adopt the proposed the draft constitution. It was also envisaged that the rights of an associate member could be revoked or reinstated on a proposal of the Commission or on an initiative of the Court with the approval of a three-quarters majority of the member states in the Council and by an absolute majority of Members of the European Parliament. He made a further call for associate membership in advance of the negotiations that led to the Treaty of Lisbon. Associate membership could provide a 'safety valve' for any member state opting to reject the Constitutional Treaty but willing to retain close links with the EU (Duff, 2007).

positions it adopted would not be prejudiced. Associate members would also be able to draw on the services of the Commission and EU agencies for the delivery of specific policies or parts of them. Arrangements would, echoing the TFEU's existing provisions on association, involve 'reciprocal rights and obligations as well as the possibility of undertaking activities jointly' (Duff, 2013a)

Duff's ideas regarding institutional arrangements also have echoes of existing principles underpinning associate status in so far as there is no provision for any decision-making role in the Council or European Council. However, Duff does envisage observer status being granted for government representatives in the Council when the latter's agenda relates to a policy area in which the associate member participates. Government representatives from the associate member would also be involved in 'appropriate' Council Working Groups. Representatives of the national parliament of the associate member would have observer status in the EP; and the associate member would enjoy observer status in comitology processes. No observer status would, however, be granted in respect of the Commission or the European Council. Instead, associate membership would entail inclusion in the 'relevant' consultation processes of the Commission' and participation in an annual multilateral meeting of the European Council and the heads of state or of government of associate members. In exchange for 'acknowledging' the jurisdiction of the Court of Justice (ECJ), the associate member would, however, be able to nominate a judge in the same way as a member state. The associate member would also be able to intervene in cases before the ECJ and institute third-party proceedings where a judgement has been prejudicial their rights (Duff, 2013a).

In the case of the United Kingdom, the attraction of associate membership is that it provides an alternative to withdrawal that can accommodate a UK desire to remove itself from certain aspects of EU integration. As Duff comments, it would be based 'essentially on those aspects of the single market which the British find palatable and its erstwhile partners tolerable' (Duff, 2012: 55). A further attraction for Duff of the proposed associate membership is that it could also prevent a UK veto of the EU's constitutional evolution (Duff, 2012). And establishing associate membership status need not wait for an amendment to the TEU; it could be negotiated as the post-withdrawal settlement envisaged in Article 50 TEU.

Gstöhl (1994) observed at the time, that Opinion 1/91 may play a role whenever the ECJ assesses the need to safeguard the autonomy of the Community legal order with regard to international agreements. It can equally be assumed that a similar line of argument would be adopted if any form of associate membership [EXPAND AND MOVE TO LATER DISCUSSION]

However, as press reaction to Duffs' proposals was quick to point out, as an associate member, the United Kingdom would become in effect a 'second-class' member, lose its veto over policy developments, including those affect the United Kingdom, and forge MEPs (*Daily Mail*, 2013).

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